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CITATIONS

581504—44

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 775

GREAT SOUTHERN TRUCKING COMPANY AND L. A. RAULERSON, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinions in the court below in the present contempt proceedings (R. 58–66) are reported in 139 F. (2d) 984. The opinion of the court below in the prior review proceeding (R. 8–18) is reported in 127 F. (2d) 180. This Court's denial of a writ of certiorari in the review proceeding is reported in 317 U. S. 652. The decision of the National Labor Relations Board upon which the review proceeding was based is reported in 34 N. L. R. B. 1068.

JURISDICTION

The order adjudging petitioners, Great Southern Trucking Company and its president, in contempt (R. 66–67) was entered by the court below on January 11, 1944. The instant petition for a writ of certiorari was filed on March 10, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

In a contempt proceeding brought to compel petitioners' obedience to an order directing them to bargain with the Union,[1] despite petitioners' showing that most of the employees who had designated the Union had left petitioners' employment and been replaced by new employees, the court below refused to modify its order, held that compliance therewith was necessary to free the employees from the restraints of the unfair labor practices, and entered an interlocutory decree adjudging petitioners in contempt and requiring them to bargain with the Union as previously directed. The questions are whether these facts present issues reviewable by the Court and, if so, whether the court below abused its

[1] International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, Local No. 71.

discretion in requiring obedience to its lawful order.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*), are set forth in the Appendix, *infra,* p. 13.

STATEMENT

On August 26, 1941, the Board issued its decision and order finding that petitioner, Great Southern Trucking Company, had engaged in unfair labor practices at its Charlotte, North Carolina, terminal. Briefly stated, the facts as found by the Board are:

In 1938 and 1939 when the employees at the Charlotte terminal began to join the Union, petitioner company interrogated them regarding their union affiliations, disparaged the Union and its leaders, attempted to discourage the employees from joining the Union and sought to induce them to withdraw therefrom (34 N. L. R. B. 1071–1074).

Notwithstanding petitioner company's opposition, by April 10, 1939, 28 out of the approximately 37 employees in the appropriate unit at the Charlotte terminal had joined the Union (34 N. L. R. B. 1075). Petitioner company at all times thereafter refused to bargain collectively with the Union but instead attempted to under-

mine the Union's majority by unilateral dealings with its employees and other antiunion activities (34 N. L. R. B. 1073–1086).

On September 6, 1939, 36 of the employees at the Charlotte terminal went on strike as a result of petitioner company's refusal to bargain (34 N. L. R. B. 1082–1083, 1087). The strikers were immediately discharged and replaced with new employees (*id.*). On September 13, 1939, petitioner company refused to negotiate with the Union on the ground that it did not represent the employees hired to replace the strikers (34 N. L. R. B. 1084).

Upon the above facts, the Board concluded that petitioner company had violated Section 8 (1), (3), and (5) of the Act (34 N. L. R. B. 1092). It found that the Union's loss of majority was due to unfair labor practices and determined that under the circumstances an order to bargain with the Union was appropriate (34 N. L. R. B. 1086–1087). The Board therefore ordered petitioner company, and its officers, agents, successors, and assigns, to cease and desist from the unfair practices, to bargain collectively with the Union, to offer the 36 discharged strikers reinstatement with back pay,[2] and to post appropriate notices (34 N. L. R. B. 1092–1094).

[2] Another Charlotte employee, not in the bargaining unit, and three High Point employees who joined the strike were also ordered reinstated with pay.

Petitioner company filed a petition to review the order of the Board in the court below and the Board in its answer requested its enforcement. On April 13, 1942, the court below, in accordance with its opinion of the same day (R. 8–18), entered its decree enforcing the order in full (R. 19). Thereafter, petitioner company applied to this Court for a writ of certiorari, which was denied on October 12, 1942 (R. 20, 22). Although petitioner company, in the court below, and again in the application to this court for certiorari (see p. 37, Petition for Certiorari, No. 227, October Term, 1942), renewed its contention that the duty to bargain with the Union ceased when the striking employees were discharged and replaced, the Board's determination to the contrary was enforced without discussion.

Petitioner company took no measures to remedy its unfair practices of 4-years' standing until after the denial of certiorari. On February 9, 1943, while still in the process of complying with other provisions of the decree,[3] petitioner company refused to bargain collectively with the Union as ordered by the court below (R. 31).

On March 5, 1943, petitioner company filed a motion with the Board requesting a redetermina-

[3] The required notices to employees were not posted until January 11, 1943, 3 months after the lower court's decree became final by the denial of certiorari (R. 34), and their posting period did not expire until March 12, 1943 (R. 4), a month after the above refusal to bargain.

tion of the Union's majority status. The motion stated that most of the 1939 strikers had refused to accept the reinstatement offered by petitioner company after the application for certiorari was denied and that the replacement employees had signed a petition disclaiming the Union as their representative (R. 35). On March 20, 1943, the Board denied the motion and requested petitioner company to comply with the bargaining provisions of the lower court's decree (R. 57–58). Petitioners did not comply (R. 27–29).

Thereupon, the Board petitioned the court below to adjudge petitioners in contempt for their refusal to obey the bargaining order (R. 21–29). Petitioners, answering the Board's petition, admitted the refusal to bargain as directed, pleaded the failure of the strikers to accept reinstatement and the replacement employees' disavowal of the Union in defense, and requested the court to modify its order in view thereof (R. 31–55). On January 10, 1944, upon consideration of the uncontroverted statements in the pleadings, and oral argument and written briefs, the court filed its opinion, one judge dissenting, in which it refused the requested modification and directed the issuance of an order adjudging petitioners in contempt (R. 58–66). The court held that the Union must be presumed to have a continuing majority status, else petitioner company's unfair labor practices will at last have their intended effect (R. 60–62). The court pointed out that until the

petitioner company's long record of opposition to the Union was remedied by bargaining with the Union it was impossible for the court to determine whether any of the employees, including those hired to replace the discharged strikers, did or did not wish the Union to represent them (R. 60–63).

On January 11, 1944, the court below entered an order adjudging petitioners in contempt (R. 66–67). The order allowed petitioners 30 days in which to purge the contempt by bargaining with the Union and provided for further proceedings before the court (*id.*).

Subsequently, petitioners moved the court below to extend the time for purgation. On March 13, 1944, such time was extended until after disposition of petitioners' application for a writ of certiorari, which was filed on March 10, 1944.

ARGUMENT

1. The contempt proceeding in the court below, being solely for the purpose of enforcing an affirmative remedial order, which this Court on petition for certiorari refused to consider, presents no issue for review. Cf. *McMicken* v. *Perin,* 20 How. 133. Nothing contained in the decree permitted of the construction that its terms were subject to the Union's regaining the majority status it had lost through petitioners' unfair practices. The decree, in plain language, fixed the obligation upon petitioners to bargain with the

Union and, by its unconditional terms, excluded any inconsistent interpretation. That petitioners refused to obey the court's mandate was admitted. It is axiomatic that the order of the court below, since not modified or reversed, required compliance, and that disobedience of it constituted contempt. *United States* v. *Shipp,* 203 U. S. 563, 573; *Gompers* v. *Bucks Stove & Range Co.,* 221 U. S. 418, 450; *Howat* v. *Kansas,* 258 U. S. 181, 189–190; *Toledo Scale Co.* v. *Computing Scale Co.,* 261 U. S. 399, 425. Equally settled is the proposition that the bargaining order was not susceptible of collateral attack in the contempt proceeding. Cf. *Oriel* v. *Russell,* 278 U. S. 358, 363; *Brougham* v. *Oceanic Steam Navigation Co.,* 205 Fed. 857, 860 (C. C. A. 2); *Trickett* v. *Kaw Valley Drainage Dist.,* 25 F. (2d) 851, 858 (C. C. A. 8), certiorari denied, 278 U. S. 624; *Alemite Mfg. Corp.* v. *Staff,* 42 F. (2d) 832 (C. C. A. 2); *Locke* v. *United States,* 75 F. (2d) 157, 159 (C. C. A. 5), certiorari denied, 295 U. S. 733; *McCann* v. *New York Stock Exchange,* 80 F. (2d) 211, 214 (C. C. A. 2), certiorari denied, 299 U. S. 603.

Upon petitioners' admission that they had refused to bargain as directed, unaccompanied by a showing of an inability to do so, all issues requiring decision were eliminated from the proceeding. This, in effect, is the holding in *Oriel* v. *Russell,*

supra, in which the Court stated that the only matter admissible in a contempt proceeding for commitment of a bankrupt for failure to comply with a turnover order is evidence of a newly arisen "inability on the part of the bankrupt to comply." See also, *In re Sobol,* 242 Fed. 487, 489 (C. C. A. 2); *Perry* v. *Western Union Telegraph Co.,* 27 F. (2d) 197 (C. C. A. 6); *Katz* v. *Katz,* 113 N. J. Eq. 75, 166 Atl. 176; *Mary Jane Stevens Co.* v. *Foley,* 67 Utah 578, 248 Pac. 815.

2. The court below, having undertaken consideration of petitioners' contention that it was relieved of compliance with the order to bargain upon the refusal of the strikers to accept reinstatement and upon receipt of the letter from the replacement employees disavowing the Union, correctly rejected the contention and required obedience to the order. The determination of the court that it would best effectuate the policies of the Act to require petitioners to comply with the order to bargain with the Union, notwithstanding the change in personnel in the unit, was a proper exercise of discretion in a contempt proceeding and within the principles laid down by this Court in *National Labor Relations Board* v. *Bradford Dyeing Assn.,* 310 U. S. 318; *International Ass'n of Machinists* v. *National Labor Relations Board,* 311 U. S. 72; *National Labor Relations Board* v. *P. Lorillard Co.,* 314 U. S. 512.

Petitioners' contention (Pet. 27) that *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240, is controlling authority to the contrary is erroneous. (1) In that case the Board's order requiring the employer to bargain with the union rested upon the assumption that all of the discharged employees would be reinstated and those new employees who replaced them discharged. The Board did not determine that there should be an order to bargain if the discharged employees were not restored to their jobs. The Board made no assumption that, absent a restoration of the discharged strikers, the union in that case would have maintained its majority by accretions from among the old employees who remained or from new employees. Nor did the Board argue before this Court that the bargaining order should be enforced even if the 93 discharged employees were not entitled to reinstatement (see Board Brief, No. 436, October Term, 1938, pp. 69–70). (2) There the intervening unlawful acts of the union members and the employer's lawful discharge for that reason of the bulk of the union membership broke the chain of causation normally leading from the unfair labor practices to the loss of majority. Thus, the Court's refusal to enforce the bargaining order was in that case a necessary consequence of its refusal to uphold the reinstatement of the 93 strikers. The instant case is quite different:

(a) The court below, in enforcing its decree, has answered the question which the Board left unanswered in the *Fansteel* case by determining that petitioners were under a continuing duty to bargain with the Union; (b) here there was no intervening circumstance which compelled the assumption that the Union would have lost its majority regardless of petitioners' unfair labor practices, but on the contrary, as the court below noted, a clear causal connection exists between the unfair practices and the subsequent loss of the Union's majority (R. 61–62).

The decision of the Ninth Circuit Court of Appeals in *National Labor Relations Board* v. *Hollywood-Maxwell Co.*, 126 F. (2d) 815, cited by petitioners (Pet. 31), is similarly distinguishable because of the intervening unlawful act of the union's organizer present in that case. Each of the other cases urged by petitioners (Pet. 28–31) in support of a view opposite to that expressed by the court below has been superseded by decisions adopting the principles of the *Bradford Dyeing, Machinists,* and *Lorillard* cases, *supra.*[4]

3. Finally, aside from the Board's position in *Franks Bros. Company* v. *National Labor Relations Board,* No. 521, this Term, the adjudication in contempt, being merely in aid of an unreversed lawful order, was proper. Cf. *Brougham* v.

[4] See cases collected in the Board's brief in *Franks Bros. Company* v. *National Labor Relations Board*, No. 521, this Term, pp. 9–11, n. 7.

Oceanic Steam Navigation Co., 205 Fed. 857, 861; *DeLaMater* v. *Graves*, 69 Colo. 255, 193 Pac. 552; *State* v. *Giddings*, 98 Minn. 102, 107 N. W. 1048.

CONCLUSION

The contempt adjudication below is correct and presents no conflict of decisions or question warranting review. The petition should therefore be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

ALVIN J. ROCKWELL,
General Counsel,
RUTH WEYAND,
WINTHROP A. JOHNS,
Attorneys,
National Labor Relations Board.

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